

MiFID II

UK implementation update

The FCA has published its second policy statement on the implementation of MiFID II (PS17/14)¹ and a final, sixth, consultation paper (CP17/19).²

What does the policy statement cover?

In PS17/14, the FCA finalises the rules it published, in near final form, in its first policy statement on MiFID II implementation, PS17/5.³ It also summarises the feedback it received from across CP15/43, CP16/19, CP16/29, CP16/43, and CP17/8, but most notably the client asset rules from CP16/19 and the conduct rules from CP16/29. Therefore, PS17/14 contains the FCA's final rules on a number of important conduct issues, including:

- **Inducements in relation to research payments** - the FCA confirms that it will apply MiFID II provisions to collective portfolio managers and not only to the investment firms that are subject to MiFID II. In response to consultation feedback the FCA has amended its guidance on how quickly firms should pass research charge deductions into a research payment account (RPA), and clarifies that it does not require investment managers to have a single RPA per research budget. The FCA also introduces an exemption for private equity business and also makes clear that collective funds investing in non-MiFID financial instruments, such as commercial property, are not in-scope.
- **Client categorisation** - the FCA has lowered to £10m the quantitative criteria portfolio threshold for local authorities opting up to professional client status. The FCA's intention is to ensure that the quantitative criteria is more appropriately aligned to the structure and nature of UK local authorities, both when undertaking treasury management and pension administration activities. The criteria will apply to both MiFID and non-MiFID investment business.
- **Best execution** - the FCA will extend the MiFID II best execution regime to Article 3 financial advisers and UCITS firms. However, in a change from its previous proposals, the FCA will not apply the changes in the best execution rules in MiFID II to Alternative Investment Fund Managers

(AIFMs). This means full-scope UK AIFMs and incoming EEA AIFM branches will remain subject to the existing best execution standards at this stage. The FCA will also delay the extension of the MiFID II best execution rules to small authorised UK AIFMs and residual CIS operators, as proposed in its consultation.

- **Appropriateness** - the FCA maintains its view that collective investment undertakings other than Undertakings for Investments in Transferable Securities (UCITS), including non-UCITS retail schemes (NURS) and investment trusts, are neither automatically non-complex nor automatically complex.
- **Taping** - the FCA confirms removal of the current partial exemption in its taping rules for discretionary investment managers, albeit making some modifications to the way the rule applies. However, in response to feedback, the FCA has removed financial instruments not linked to trading on a trading venue from the scope of instruments required to tape by non-MiFID firms. The FCA also gives further detail on what is required of an Article 3 firm that takes a note rather than record a telephone conversation. In relation to corporate finance business, the FCA, again, has tweaked the approach it consulted on. The FCA will not extend the MiFID II taping regime to capture all aspects of corporate finance business. However, firms must record conversations and electronic communications that are in scope of MiFID II. These are communications that result in (or are intended to result in) transactions concluded when dealing on own account and the provision of client order services that relate to the transmission and execution of client orders.

What about the consultation paper?

This consultation deals with a small number of FCA Handbook changes for which the FCA has not previously consulted, including:

- Financial Services Compensation Scheme (FSCS) cover for recognised investment exchanges (RIEs) operating multilateral trading facilities (MTFs) and organised trading facilities (OTFs);
- changes to the FCA's proposed amendments to the Decision Procedures and Penalties Manual (DEPP) and Enforcement Guide (EG) previously described in CP17/8. These arise from finalised implementing legislation which extend the scope of the FCA's enforcement powers, but the FCA states that they do not change the substance of its proposals in CP17/8; and
- technical changes to the Prospectus Rules (PR) and Glossary, consequential to finalised implementing legislation.

¹ PS17/14: Markets in Financial Instruments Directive II Implementation - Policy Statement II

² CP17/19: Markets in Financial Instruments Directive II Implementation - Consultation Paper VI

³ PS17/5: Markets in Financial Instruments Directive II Implementation - Policy Statement I

Is there anything else to come from the FCA on MiFID II?

Yes:

- final versions of Handbook guides on the implementation of the markets provisions in MiFID II and the organisational requirements in MiFID II, consulted on in CP15/43 and CP16/19;
- feedback on FCA proposals in relation to business conducted by occupational pension scheme (OPS) firms, previously consulted on in CP17/8; and
- feedback on CP17/19.

What next for firms?

- Firms should have MiFID II implementation plans now firmly established and underway.
- The deadline for responses to CP17/19 is 7 September 2017 and the FCA hopes to publish a response in November 2017.
- Firms that still need to apply for authorisation or variation of permission should prioritise as a matter of urgency their submission of complete applications. The FCA cannot guarantee that these applications will be determined by 3 January 2018. It states that such firms must have contingency plans in the event that by 3 January 2018 they do not have the required permissions.
- The FCA also states that industry testing is now open for its **Market Data Processor (MDP) system** which will manage large volumes and a range of data for the FCA under MiFID II. The MDP will help firms to fulfil their obligation to report to the FCA directly or through an Approved Reporting Mechanism (ARM). Entities that need to submit data from 3 January 2018 should start the MDP on-boarding process now.

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